FILE COPY

Office-Supreme Court, U.S.
FILED
JAN 26 1960
JAMES R. BROWNING, Clerk

No. 671

Supreme Court of the United States

OCTOBER TERM, 1959

GEORGE C. MATHEWS, *Petitioner*,

v.

THE SEYMOUR MANUFACTURING COMPANY, EARL B. BOLES, ET AL., *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR PETITIONER

DEAN ACHESON
STANLEY E. TEMKO
JOHN W. DOUGLAS
701 Union Trust Building
Washington 5, D. C.

LEO V. GALLAGHER
JOHN P. HOBSON
JOHN S. BARTON
ROBERT M. FITZGERALD
THOMAS KEISER GEIER
Attorneys for Petitioner

MARX FRIEDMAN
CURTIS V. TILLS
A. REYNOLDS GORDON
COVINGTON & BURLING
Of Counsel

JANUARY, 1960

Supreme Court of the United States

OCTOBER TERM, 1959

No. 611

GEORGE C. MATTHIES, *Petitioner*,

v.

THE SEYMOUR MANUFACTURING COMPANY, EARL B. BOIES, ET AL., *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR PETITIONER

The Brief in Opposition exhibits a remarkable purpose. Respondents have undertaken to rise above controversy by drawing a strange picture of what these actions are about. With delicate phrase, they refer to this litigation as a "family dispute" over the management of the trusts and the Seymour Company. The whole matter, respondents suggest, is rather a bore; certainly nothing the federal courts should bother about. This attitude of disdain may avert the eyes, but it cannot hide what cannot be hidden—that petitioner, in his representative suits under Federal Rules 23(a) and 23(b), charges in meticulous detail a long-continued pattern of fraud and mismanagement of the trusts by respondents and seeks in the derivative suit alone a $7,500,000 recovery on behalf of the several corporations whose stock the trusts hold.

Respondents' Brief discloses something more important than bland understatement. The refined and patronizing survey of the "family dispute" in fact masks respondents' desire to avoid meeting petitioner on the important issues of federal jurisdiction and procedure that have been presented for this Court's consideration. The Court can hardly countenance such an attempt to preclude review of a decision which Judge Clark—who more than anyone is responsible for the adoption of the Federal Rules—has aptly described as reading into these important rules "troublesome restrictions" which will undermine their future utility (Pet., pp. 90a, 91a). Respondents should be well aware that they may not wish away legal issues of broad scope simply by dwelling upon facts which can serve only to show that basic questions of federal law may arise in homely contexts. This Court is not being called upon to adjudicate a "family dispute". The substantive issues of this litigation are to be decided, as they properly should be, by the lower courts after the jurisdictional issues have been resolved.

1. Treating the question presented in the Rule 23(a) action, respondents do little more than advance wholly unsubstantiated claims attacking petitioner's good faith in bringing the representative actions in a federal court (pp. 12-13). They completely ignore the District Court's finding, made after a hearing, that probable cause existed as to the merits of the suits (Pet., pp. 49a, 50a).[1] Quite apart from the fact that these asser-

[1] Similarly without basis is respondents' assertion that petitioner "proved to be a faithless representative" because of his offer to compromise the suits (pp. 6-7, 13). Judge Smith, after carefully considering this question, came to just the opposite conclusion (Pet., pp. 49a-51a; see also Pet., p. 84a).

tions strike a flat note coming from those charged with serious wrongs, they are no way in which to deal with the issue raised in the Rule 23(a) action.[2]

Indeed, with regard to the suit under Rule 23(a) respondents touch on the legal question only once. They describe it to be a "fallacy" to equate "the necessity to protect and bind the holders of interests, no matter how remote, with the necessity to join them as parties" (p. 12). But, we submit, this is exactly what Rule 23(a) calls for. As respondents' later discussion acknowledges (pp. 13-14), their approach leads inevitably, in Judge Clark's words, to a "ranking among representers", to a "process of subinfeudation whereby certain of the class are pushed into a secondary rank" (Pet., p. 91a). Here, respondents, in their wisdom, have chosen some of the remaindermen for such a status.

2. Respondents' treatment of the issue in the Rule 23(b) derivative action is no more responsive. Their distinction of the *Hurt* case amounts to a play upon words. The plaintiff there is described as "one of several legatees of specific shares" (p. 16). But why is the *Hurt* plaintiff an owner of "specific shares" and the petitioner here not? In fact, of course, neither petitioner nor the *Hurt* plaintiff owns "specific shares." The former is a beneficiary of trusts having other beneficiaries; the latter a legatee under a will having other legatees, as the court in the *Hurt* case stated. 145 F.2d at pp. 294, 296.

[2] Equally unfounded is respondents' presumptuous statement that "granting of certiorari would only further postpone the correct result reached in these cases" because after reversal by this Court, the Court of Appeals below, on remand, would decide respondents' other grounds for appeal in their favor (Brief, p. 7 n. *).

The opinion in the *Hart* case makes plain, moreover, that the plaintiff there sued for wrongs against the corporation committed *before* he acquired legal title to the stock by purchase from the executor of the estate. *Ibid.* Contrary to respondents' assertion, he was not, therefore, "the equitable as well as the legal owner" of the stock for the purpose of determining his status as a "shareholder" under Rule 23(b).

3. We turn finally, and briefly, to respondents' last claim. The striking assertion is made that these cases are "inappropriate for the grant of certiorari" because "this Court's committees are to consider the Rules" (p. 18). Respondents then purport to buttress this proposal by the citation of two recent decisions in which this Court, as in the illustrative cases cited by petitioner (Pet. , p. 9), *granted* certiorari and decided problems involving the Federal Rules.

But respondents' proposal is unsound on the merits as well. They would permit the lower federal courts to create grave confusion in the application of certain of the rules and then have "this Court's committees," perhaps years thereafter, survey the confusion and propose changes which—even later—may or may not be promulgated by this Court. It is one thing to suggest that amendments or changes in the rules should wait upon the work of this Court's advisory committees. But that is not the problem here. The petition presents for review rulings which are contrary to the manifest intent of the rules. Rectification should not await revision, but should be achieved through immediate review by this Court.

CONCLUSION

The issues raised in the Petition for Certiorari are substantial. It is evident that they have been untouched by respondent's Brief in Opposition. The petition should be granted.

Respectfully submitted,

DEAN ACHESON
STANLEY L. TEMKO
JOHN W. DOUGLAS
701 Union Trust Building
Washington 5, D. C.

LEO V. GAFFNEY
JOHN P. HODGSON
JOHN S. BARTON
ROBERT M. FITZGERALD
THOMAS KEISTER GREER

Attorneys for Petitioner

ALVIN FRIEDMAN
CURTIS V. TITUS
A. REYNOLDS GORDON

COVINGTON & BURLING
Of Counsel

January, 1960